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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 301.

LOUIS K. LIGGETT COMPANY, a corporation *et al.*,

Appellants,

—against—

ERNEST AMOS as Comptroller of the State of Florida *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR APPELLANT LOUIS K. LIGGETT COMPANY.

ROY M. STERNE,
Counsel for Appellant,
Louis K. Liggett Company.

THE COURT PRESS, INC.

(Corrections for figures on pages 8, 9 and 10 an

The tabulations shown on pages 8, 9 and 10 fa
brackets, and the figures for taxes on stores in
read as follows:

If in one county

No. of stores	Tax per store	Total
10	9.50	95.
20	11.00	220.
30	12.33	370.
40	14.25	570.
50	15.40	770.
60	17.83	1070.
70	19.57	1370.
80	21.50	1720.
100	25.20	2520.
200	32.60	6520.

The first two paragraphs of page 11 should be

Viewed in terms of the opening of one additi
picture.

15 stores in one county, to open one additional
30 " " " " " " "
50 " " " " " " "
75 " " " " " " "
100 " " " " " " "
200 " " " " " " "

The reason for these extraordinary results is
store) go from $10.00 each for stores under 16 in
30 stores in two counties; from $15.00 each for
$30.00 each for 31 to 50 stores in two counties;
in one county to $40.00 each for 51 to 75 stores
stores over 75 in one county to $50.00 each for s

and 11 of brief.)

fail to take into consideration the lower
in one and more than one county should

If in two counties.	
Total Tax	Tax per store.
140.	14.00
315.	15.75
515.	17.16
815.	20.37
1115.	22.30
1515.	25.25
1915.	27.35
2365.	29.56
3365.	33.65
8365.	41.82

be as follows:

itional store you get the following

al store in another county, costs $90.00.
" " " " " $175.00.
" " " " " $385.00.
" " " " " $645.00.
" " " " " $895.00.
" " " " " $1895.00.

is that the taxes (except for the first
in one county to $20.00 each for 16 to
or from 16 to 30 stores in one county to
s; from $20.00 each for 31 to 50 stores
es in two counties; from $40.00 each for
r stores over 75 in two counties.

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ERNEST AMOS, as Comptroller of the State of Florida, *et al.*,

Appellees.

BRIEF FOR APPELLANT LOUIS K. LIGGETT COMPANY.

This brief is presented on behalf of the Appellant, Louis K. Liggett Company.

A. Nature of the Case. The case involves the constitutionality of an occupational license tax statute applying to merchants, prescribing discriminating license fees according to the number of stores owned and according to whether the stores are located in one county or in more than one county.

B. Official Report of the Opinion below.

The opinion of the Supreme Court of Florida, concurred in by four justices, together with the dissenting opinion of two of the justices of that court, will be found in 141 So. Rep., pages 153 to 171.

C. Brief Statement of the Case.

The legislature of Florida passed an act, Chapter 15624, Acts of 1931, also called "State of Florida Chain Stores License Tax," which became a law without the Governor's signature on July 3, 1931.

This act is an occupation tax statute applying to merchants, requiring a license for the privilege of owning or operating a store or stores in the State of Florida, graduated in an ascending scale according to the number of stores owned, and providing a new and unique type of discrimination, based on county lines alone, so that higher amounts (ranging from fifty per cent. to twenty-five per cent.) are required if the stores are located in different counties than for the same number of stores located in one county.

The term "store" is defined in Section 8 of the statute as follows:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores* of (or?) any mercantile establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, *in which goods, wares or merchandise of any kind are sold at retail.*" (Italics ours.)

Section 5 of the act is as follows (italics ours):

> "Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.
>
> The license fees herein prescribed shall be as follows:
>
> "(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

(3) *Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.*

(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

(5) *Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.*

(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

(7) *Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.*

(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

(9) *Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.*

(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

(11) *Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.*

In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store.' "

The complainants, owners of two or more stores, located in different counties, sought through their amended bill of complaint (R. 2 to 76), filed in the Circuit Court of Leon County, Florida, to restrain the enforcement of the act, and to have it declared invalid because arbitrary and unconstitutional. The bill set out facts affirmatively showing that no basis exists for discrimination or for classifying appellants' stores differently from the stores of merchants favored by the act, and particularly and in detail denied the existence of any facts or grounds of difference warranting discrimination or different classification. As it will be necessary in the argument to discuss at some length the facts set up in the amended bill, in order to avoid burdening the court with repetition we respectfully refer the court to the amended bill of complaint on pages 2 to 76 of the record, and particularly to Sections II, III, IV, VII, VIII, IX (R. 22 erroneously numbered XX), X, XI, XII, XIV (which we particularly stress), XV and XVI; also to the petitions for intervention, pages 79 to 101 of the record.

Appellees filed a motion to dismiss the amended bill (R. 77) which motion was granted by the Circuit Court (R. 101). The case was appealed to the Supreme Court of Florida, and there affirmed (R. 148, R. 159); and it is from the final decree of the Supreme Court of Florida that this appeal is taken. The motion to dismiss admitted the facts set forth in the amended bill; yet the Supreme Court of Florida by its action, refused to hear the complainants, and thereby deprived them of their day in court.

Points and Summary of Argument.

This appellant relies principally upon two points, First, the county line discrimination, which we firmly believe requires that the act be declared void on its face; and secondly, the failure of the lower court to hear the appellants on the factual situation set up in the bill, and admitted by the motion to dismiss. These points for purposes of focusing the discussion may be stated as follows:

POINT I.

An act which imposes a greater privilege tax per store on several stores located in two or more counties than on the same number of stores located in one county,—there being no basis for the discrimination or classification, and no distinction between the stores other than that in one case all the stores are in the same county and in the other case one or more of the stores may be located in a different county from the remaining stores,—is arbitrary and unreasonable.

POINT II.

(a) Where a bill of complaint sets up facts affirmatively showing that no basis exists for discrimination or for classifying complainants' several stores for occupational license taxes differently from unit stores, and particularly denies the existence of any facts or grounds warranting discrimination or different classification as between multiple stores and unit stores, the complainants have a right to show by their evidence that discriminations in a state occupational license statute are arbitrary and unreasonable; and the granting of a motion to dismiss, which motion admits complainants' averments, is error.

(b) The action of the Florida courts in sustaining a motion to dismiss complainants' bill charging arbitrary discrimination in taxation and denying the complainants' right to be heard on the facts pleaded in their bill and admitted by the motion, denies to complainants their day in court, and deprives them of their property without due process of law.

(c) The Florida courts did not have the right to substitute assumed judicial notice for the sworn facts pleaded in complainants' bill and admitted by the motion to dismiss, but should have allowed the complainants the opportunity to be heard on their evidence, instead of dismissing the bill on motion.

Argument.

POINT I.

The County Line Discrimination.

It may be well before proceeding with the argument to get a perspective of the situation by asking, What is a store? The occupation taxed is that of keeping a store—and a store as defined includes *any place* where goods or merchandise of any kind are sold at retail. Therefore, a store may be any place whatsoever, of whatsoever size and dealing in whatsoever commodities. It may occupy a space 10 x 10, deal in cigars, chewing gum and candy bars, and do a business of $10 a day; it may be a soft drink stand dealing in soda pop and sandwiches; it may be a haberdashery store or a small apparel store doing $20,000 to $50,000 a year volume; it may be a clothing store, or any other type of store doing a business of a hundred or two or three hundred thousands of dollars annually; it may be located in a poor section, or be a country village convenience store; it may be a choice corner located in the busiest section of a city; it may be a one-story general merchandise place, or it may be a ten-story affair occupying a city block, containing thousands of square feet, and doing a business of millions of dollars a year; it may have a stock of a few hundred dollars, or it may carry merchandise whose value runs into hundreds of thousands, or even millions of dollars. There is in the statute no distinction based upon any standard of any kind; if it sells any merchandise at retail, it is a store.

The State of Florida has undertaken to tax all such places; and if a person owns two or more such stores, large, small or medium sized, valuable or worthless, they are taxed at the ascending rates set forth in the statute.

But the Florida statute goes much further than this. If a merchant has his stores located in one county, he pays

one rate, but another and much higher rate if the stores happen to be located in different counties. It may be much easier to operate two or more stores located in a single city in a single county, from the standpoint of supervision, delivery of goods, and in other respects, than if the stores were in different counties; nevertheless, if the merchant opens his second store in a different county or already has a store in a county different from the county in which his other stores are located, his tax rises on a rapidly ascending scale; while his competitor with the same number of stores in one county pays a much lower rate.

The working out of the brackets of the Florida act (using for convenience 10 store graduations), gives result as follows: (Note, for the first store the tax is $5.00.)

On ten stores in one county, the nine stores over one pay $10.00 each, or $90.00, total for the 10 stores $95.00 or $9.50 each; on ten stores, nine in one county, one in another, the nine stores over one pay $135.00, total for the 10 stores $140.00 or $14.00 each. The percentage increase tax in the stores over one is 50% for having stores in different counties.

On 20 stores in one county, $15.00 for each store in excess of one or $285.00 for the 19 stores, total $290.00 or $14.50 per store; on 20 stores, 19 in one county, one in another county $20.00 for each store over one or $380.00 for the 19, total for the 20 stores $385.00 or $19.25 per store. The percentage increase in the tax on stores over one is 33⅓% for having stores in different counties.

On thirty stores in one county, $15.00 for each store over one, or $435.00 for the 29, total $440.00 for the 30, or $14.66 per store; on thirty stores, 29 in one county, one in another county, $20.00 for each store over one or $580.00 for the 29, total for 30 stores $585.00 or $19.50 per store.

On forty stores in one county, $20.00 for each store over one or $780.00 for the 39 stores, total for the 40 $785.00 or $19.62 per store; on 40 stores, 39 in one county, one in

another, $30.00 for each over one, or $1,170.00 for the 39, total for the 40 $1,175.00 or $29.37 per store. The percentage rate of increase on stores over one is 50% for having stores in different counties.

On fifty stores in one county, $20.00 for each store over one or $980.00 for the 49, total for the 50 stores $985.00 or $19.70 per store; on fifty stores, 49 in one county, one in another county, $30.00 for each store over one or $1,470.00 for the 49, total for 50 stores $1,475.00 or $29.50 per store.

On sixty stores in one county, $30.00 for each store over one or $1,770.00 for the 59, total for sixty $1,775.00 or $29.58 per store; on 60 stores, 59 in one county, one in another county, $40.00 for each store over one or $2,360.00 for the 59, total for the 60 $2,365.00 or $39.42 per store. The percentage rate of increase for having stores in more than one county is 33⅓%.

On seventy stores in one county, $30.00 for each store over one, or $2,070.00 for 69 stores, total for 70, $2,075.00 or $29.64 per store; 70 stores, 69 in one county, one in another county, $40.00 on each store over one or $2,760.00 for the 69, total for 70 stores $2,765.00 or $39.50 per store.

On eighty stores in one county, $40.00 for each store over one or $3,160.00, total for 80 $3,165.00 or $39.56 per store; on 80 stores, 79 in one county, one in another county, $50.00 for each store over one or $3,950.00 for the 79, total for 80, $3,955.00 or $49.43 per store. The percentage rate of increase for having stores in different counties is 25% in this bracket.

One hundred stores in one county would carry tax of $3,965.00 or $39.65 per store; one hundred stores in two counties would carry a tax of $4,955.00 or $49.55 per store.

Two hundred stores in one county would carry a tax of $7,965.00 or $39.82 per store; 200 stores in two counties would carry a tax of $9,955.00 or $49.77 per store.

A recapitulation of the above gives the following table:

	If in one county		If in two counties	
No. of stores	Tax per store	Total tax	Total tax	Tax per store
10	9.50	95.	140.	14.00
20	14.50	290.	385.	19.25
30	14.66	440.	585.	19.50
40	19.62	785.	1175.	29.37
50	19.70	985.	1475.	29.50
60	29.58	1775.	2365.	39.42
70	29.64	2075.	2765.	39.50
80	39.50	3165.	3955.	49.43
100	39.65	3965.	4955.	49.55
200	39.82	7965.	9955.	49.77

The arbitrary nature of the county line discrimination is graphically visualized when you consider the above tables in relation to two merchants: one who has all his stores in one county, and the other having stores in two or more counties. The one-county merchant is greatly favored by the lower taxation, and an arbitrary penalty put on all merchants for having or opening stores in more than one county.

The arbitrary nature of this discrimination is further shown by the fact that the higher rates become retroactive on all stores in a single county, if an additional store is opened in another county.

If a merchant has 15 stores in one county he pays $145.00 for his stores, $5.00 for the first and $10.00 for each of the others; if he has 14 stores in one county and has or opens another in a different county, he pays $5.00 for his first store and $15.00 for each of his other 14, or 50% additional per store (over one) merely because he opens one in a different county. In other words, the higher tax applies not only to the one in the new county, but reacts so as to make the tax higher in all other stores. And so on through the brackets.

Viewed in terms of the opening of one additional store you get the following picture:

14 stores in one county, to open one additional store in another county, costs $80.00.

15 stores in one county, to open one additional store in another county, costs $160.00.

30 stores in one county, to open one additional store in another county, costs $465.00.

50 stores in one county, to open one additional store in another county, costs $1020.00.

75 stores in one county, to open one additional store in another county, costs $1530.00.

100 stores in one county, to open one additional store in another county, costs $1040.00.

200 stores in one county, to open one additional store in another county, costs $2040.00

The reason for these extraordinary results is that the tax (except for the first store) goes from $10.00 for each of 15 stores in one County to $20.00 for each of 16 stores in two Counties, increasing per store 100%; from $15.00 for each of 30 stores in one County to $30.00 for each of 31 stores in two Counties, increasing per store 100%; from $20.00 for each of 50 stores in one County to $40.00 for each of 51 stores in two Counties, increasing per store 100%; from $30.00 for each of 75 stores in one County to $50.00 for each of 76 stores in two Counties, increasing per store 66-2/3%.

It will be seen that having or opening one store in one additional county causes every bracket along the line to go up.

This county line discrimination goes far beyond the reason and intent of the opinion in the Indiana chain store tax case (*Jackson* v. *State Board, etc.*, 283 U. S. 527). If a merchant has fifteen stores, and opens a sixteenth, the

Indiana case permits the tax on the sixteenth store to be greater than for the other fifteen.

The Florida statute goes further in three respects when the sixteenth store is in a separate county: First, it provides that the rate of taxation shall go up once because it is the sixteenth store, and second, that it shall go up again because it is in another county; and third, the Florida law requires that all the other fifteen stores shall be taxed an additional amount per store because the one store is in another county.

It is well settled, we believe, that the Legislature could not prohibit a person from carrying on a common calling in more than one county; and it may not classify him for taxation for so doing except upon some reasonable basis. No reasonable ground appears why a storekeeper with fifteen stores in one county should have his tax raised on those fifteen stores because he opens a sixteenth in another county; nor does any reasonable ground appear for taxing differently one merchant who has sixteen stores in one county from another merchant having the same number of stores in two counties.

It would also appear that under the Florida statute, a storekeeper could have his taxes increased by the action of the Legislature in subdividing one county into two.

Under the reasoning of the Indiana decision, as we understand it, the heavier burdens upon the storekeeper are allowed, not because of the number of stores he has, but because the possession of a number of stores is understood to make him a different kind of merchant from the storekeeper with one store. He certainly does not, however, become still a different kind of merchant because one or more of his stores may be located in a different county from the others.

In the case of each of the appellants and intervenors, their licenses are largely added to because of the county line discrimination. Thus the Liggett Company, with 22 stores

pays $355.00 against $250.00 which it or a competitor would pay with a like number of stores in one county; and if an additional store should be added the taxes on all the other stores would also go up.

The natural effect of such county line discrimination is to discourage merchants from doing business in more than one county, or opening additional stores; and to penalize them heavily for doing so.

It is to be borne in mind at all times that the merchant having stores in two counties pays more than a merchant having a like or greater number of stores in one county on each of the stores in the same county, and also a larger amount on the additional stores in the other county or counties.

It will also be recalled at all times that these are taxes for revenue based on the privilege of storekeeping. The equal protection of the law is denied to the merchant who has stores in a county paying more per store than another merchant with the same or a greater number of stores in the same county. There is nothing but a bald, arbitrary discrimination against him, and he is deprived of his property without due process.

The entire Florida act is framed on the basis of the county line distinction. If the court attempted to strike out the brackets applying to stores in different counties, there would be left a statute which applied only to stores all located in one county. If the court attempted to strike out the brackets applying to stores in the same county there would be left a statute applying only to stores in different counties. In either of these cases, a purely arbitrary discrimination would result, in addition to the fact that the statute would be a different one from that passed by the Legislature. If the court attempted to strike out the brackets applying to different counties, and the words "when all are located in the same county" in the remaining

brackets, or if the court attempted to strike out the brackets applying to stores in the same county, and the words "where the same are located in different counties" in the remaining brackets, it could not be determined what rate of taxation was intended by the Legislature; and in either event the court, it seems to us, would be rewriting the statute for the Legislature.

The legal principles applying to taxation of this character are well settled. All persons are entitled to the protection of the guarantee of equal laws provided by our constitution and while a state may of course adjust its legislation to essential differences in situations, the classification must be reasonable, not arbitrary, and must rest upon distinctions having a logical and substantial relation to the object sought to be accomplished by the legislation; and persons circumstanced alike must be treated evenly and equally. *Kentucky Finance Corporation* v. *Paramount Exchange Corporation*, 262 U. S. 544; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

The act does not bear equally upon the merchant who has all his stores in one county and the merchant who has the same number of stores in different counties.

The oft quoted words of Justice Field in *Butchers Union Company* v. *Crescent City Co.*, 111 U. S. 746, seem here so pertinent as to bear repetition. In that case it is said that among the inalienable rights of our citizens "is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must,

therefore, be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case Justice Bradley's language holds to the clear light of the principle "that the liberty of pursuit, the right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States;" of which he may not be deprived and in which he may not be discriminated against without violating the guaranties fundamental in our constitution.

It therefore appears, we respectfully submit, that the entire Florida act is unconstitutional and void on its face.

POINT II.

The Factual Situation.

But if the Florida statute does not fall as a whole because of the county line discrimination, we respectfully submit that the court below should have allowed appellants to prove the facts set forth in the amended bill of complaint, and particularly in subsections (a) to (o) of Section XIV (R. 39 to 49).

In the Indiana Chain Store tax case, as we understand it, this court was careful to hold that the mere possession of a number of stores was not sufficient foundation for a discrimination between unit store merchants and multiple store merchants; and that the discrimination must rest upon other factors and elements sufficient to set apart and distinguish the multiple or chain store merchant from the unit store merchant. Indeed the simplest illustration is sufficient to show that mere number of stores cannot possibly be used as a distinguishing characteristic. Clothing

store Merchant A owns three stores, located on the corner of First Street, Third Street and Fifth Street on the east side of Grand Avenue. Each store does a business of $30,000.00 per annum, occupies a space of 1,000 square feet, and carries a stock of $6,000.00 of merchandise; a total business of $90,000.00 per annum, in a total store space of 3,000 feet, containing stocks aggregating $18,000.00. Clothing store Merchant B has a store located on the west side of Grand Avenue at the corner of Third Street. This store occupies 6,000 square feet of space, carries a stock of $30,000.00, and does a business of $200,000.00 per annum. Each sells partly for cash and partly on credit, spends the same amount for advertising, sells approximately the same brands of merchandise. Obviously Merchant A through the mere possession of three stores enjoys no advantages that Merchant B does not possess. To tax Merchant A $25.00 for the privilege of operating his business as a clothing merchant, $5.00 for the first store, and $10.00 for each of the others, while Merchant B pays $5.00 to enjoy exactly the same privilege would be obviously arbitrary. Therefore, if there is a difference between merchants in the same line of business sufficient to support a tax discrimination, it must be found in some essential distinction in the type of occupation. This does not mean that the distinction may be based on mere form of organization, such as that one merchant is a corporation or partnership, while the other is an individual. This court has many times held that such distinctions cannot be used for occupational license discriminations.

The term "chain store operator" is a loose one, and for occupational purposes means very little. A merchant is in the furniture business, drug business, clothing business, etc., and his experience in a drug chain would not be of any value to the furniture business. About the only patent distinction between a merchant who operates one store and the one in the same line of business who operates several

stores (aside from the fact that the first has one and the second more than one store) is that all except the first store must be handled through agents; and this would be true even of the one-store merchant if the business is owned by a corporation.

So in arriving at distinguishing factors between single stores and multiple stores, the court adopted testimony delivered by Prof. Rawles for appellants in the Indiana case, which the court summarized as follows:

> "The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to stores; abundant supply of capital, whereby advantage may be taken of opportunities for establishment of new units; a pricing and sales policy different from that of the individual store, involving slightly lower prices; a greater turnover, and constant analysis of the turn-over to ascertain relative profits on varying items; unified, and therefore cheaper and better advertising for the entire chain in a given locality; standard forms of display for the promotion of sales; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounts methods; standardization of store management, sales policies and goods sold.
>
> "The appellants' evidence indicated that all of these advantages are interrelated and interdependent in the chain store business. The witnesses conceded

> that some of them may be found in large independent grocery or drug stores or the like, but they did not, as appellee claims, state that all of them combined, exist therein, as in chain stores."

To support the discrimination as we understand the decision, it is not sufficient that a mere number of stores be owned, but the separately classified taxpayer must in actuality have differences and distinctions, if he is to be discriminated against and the discrimination upheld. It would not matter how many stores a merchant owned if he did not have the asserted advantages or differences. If multiple store owners do not have such advantages, or unit store owners do have them, it would be, as we understand, arbitrary classification to say that a merchant may be taxed at a higher rate because he owns two or more stores, without regard to the amount of his business, size of his stocks, profits earned, or some essential distinction. Present conditions in the field of merchandising are, it may be noted, in many respects different from those existing at the time the Indiana case was tried.

In the bill filed in this case, it is alleged that regardless of the conditions existing in Indiana at the time of the trial of that case, the differences on which the classification was upheld do not exist in Florida, and did not exist at the time of the filing of the amended bill.

As to quantity buying, it is stated (subsection (a), R. 39) that in Florida the amount or quantity of merchandise which can be bought by a merchant is not dependent upon the number of stores he operates, but upon the size of the business conducted, and that many merchants owning one store can and do buy their merchandise in the same or larger quantities than chain stores or merchants owning more than one store.

The Federal Census of Distribution for 1930 lists in thirteen of the larger cities of Florida,—including Daytona

Beach, Gainesville, Jacksonville, Key West, Lakeland, Miami, Orlando, Pensacola, St. Augustine, St. Petersburg, Tallahassee, Tampa, and West Palm Beach—Single store units 8818; 2 store multiples 523; three store multiples 129; local chains of four and over 235. "Chain store" merchandising has become somewhat confused with large scale merchandising, and a fact apparently lost sight of is that there are great numbers of multiple stores not merchandising on a large scale and many unit merchants who do merchandise on a large scale. It is obvious that a merchant owning two, three or four small stores does not have any advantage with respect to quantity purchasing over many merchants who own one store doing a business equal to or greater than the chains, or sufficient to carry the quantity discount. Paragraph XII of the bill (R. 36) shows that Cohen's department store in Jacksonville has more shoe merchandise than all seven shoe stores of Paxson's Inc., and other shoe merchants, both chain and unit, buy on the same terms as Paxson's. The petition of Independent Furniture Company (R. 81 and 82) shows that it owns three retail stores, and does much less business than a number of unit furniture dealers in Florida, and five furniture stores are named having each but a single store, one of which does three times as much business and the others each five times as much business as all three stores of the Independent Furniture Company; and it is alleged that single store merchants buy on equally as favorable terms as the three-store chain of the Independent Furniture Co.

Of course, mere quantity purchasing is in itself no advantage, unless the merchant is thereby enabled to buy at a lower price. In the drug and grocery business, as is alleged in the bill, the quantities necessary to obtain the best discounts on many items are so moderate that small or moderate-sized retailers can and do obtain them.

We refer the court to the allegations of the bill (R. 22 to 25) with reference to advantages of quantity purchas-

ing enjoyed by unit stores through affiliation with cooperative concerns; yet these stores are taxed only $5.00 each while competing stores of appellants are required to pay many times as much per store for the privilege of operating their stores.

In the Indiana case the court refers to cooperative buying associations and remarks that these voluntary groups cannot be as successfully integrated as chain stores under a single ownership. Without regard to the question of integration, the point here made is that if, as alleged, hundreds and thousands, even, of single store merchants are purchasing their merchandise on terms as favorable as chain stores, they are at no disadvantage in this respect. This being admitted by the motion to dismiss, does this not dispose of and eliminate quantity purchasing as a distinguishing factor between chain stores and unit stores so far as the action of the Florida court in dismissing the bill is concerned?

It may be noted that in times of falling prices large scale purchasing is a disadvantage, not an advantage; and that good merchandising might at some times require quantity purchases while at other times buying should be in the smallest possible quantities.

(b) "Mass distribution" comparable to the mass method in production is referred to, but unfortunately this very desirable end has not been attained, as is shown by subsection (b) of section XIV of the bill. Articles may be made in mass but they cannot be so distributed. The distribution process, especially through a number of stores, each with its separate set of sales people and overhead expenses, is the painful one of reversing the process of mass production, and distributing by single sales of single items to single individuals the articles which are produced by machinery in mass.

(c) With reference to "buying for cash and obtaining

the advantages of a cash discount", it is shown that this is not a characteristic of chain stores alone, or generally, but that many individual merchants owning one store buy for cash and get the cash discounts; and there are many chain store merchants, particularly chain furniture stores, ready-to-wear stores, automobiles accessory stores, etc., that do not buy for cash and do not get any cash discounts (R. 41, subsection C).

(d) As to "skill in buying so as not to overbuy and at the same time keep the store stocked with merchandise suitable in style, size, quality and quantity for the neighborhood customers who patronize them": It is alleged subsection (d), page 42, that in Florida there are many unit merchants who are shrewd and skillful buyers, and multiple store merchants who are not (contrast a recent advertisement of Macy's, saying that they employed 15 special furniture buyers, with what can be done by the three-store chain of the Independent Furniture Co., R. 79); and that skillfulness in buying is a personal attribute, regardless of whether the merchants own one or more stores. It is further alleged that the single store merchant has at least the same, or even a better opportunity, to keep his store stocked with merchandise suitable for a particular neighborhood than the chain store manager (Subsection d, R. 42).

(e) Warehousing of goods and distributing from a single warehouse to various stores.

It is alleged that in Florida this is not an advantage, but is in the nature of a convenience and expense. The Liggett Company and other appellants have no warehouse in Florida. Paxsons and many other chain companies do not use warehouses at all. Warehousing is shown to be a matter of expense, with its rent, taxes, insurance, and other charges.

A warehouse is a place where reserve stocks are carried. The advisability of having warehouses is debatable, and

merchants of all kinds try to limit the amount of their stocks as much as possible. It is obvious that if warehouses are used, the merchandise must be freighted and trucked into them, then if shipped to a number of different stores, must be repackaged and sent out, with the additional freight and cartage charges. The matter of having a warehouse may come to the question of whether it is more economical to carry reserve stocks in the individual store in basement or other like space, paying the rent therefor, or have the reserve stock somewhere else with the necessity for delivering the merchandise when needed. Many department stores and other large single store units have warehouses. The fact that a retail merchant has or does not have a warehouse does not change his status as a retail merchant. At all events it is alleged in the bill that there is no such advantage in Florida; that many individual merchants have warehouses and many chain store merchants do not have them; and these facts are admitted by the motion to dismiss.

(f) As to "Abundant supply of capital whereby advantage may be taken of opportunity for establishment of new units."

That such an advantage is not a characteristic of chain stores is averred in subsection (f) of Section XIV. It is stated that many single store merchants have abundant capital for supplying their needs or enlarging their business, and many multiple store owners do not have sufficient capital even to keep their businesses going, much less to open additional stores. During past periods of prosperity, and especially during the boom and expansion period, plenty of capital was available for all purposes, both for unit stores and multiple stores. The situation is entirely different now. In this respect there was never any difference between chain stores and unit stores, and there is none now. Formerly either could get plenty of capital, now neither can.

(g) As to "Pricing and sales policy different from that of individual stores, involving slightly lower prices." It is averred that many multiple store merchants do not have any pricing or sales policy different from that of individual stores. In the drug business especially, great numbers of merchants having single stores advertise themselves as "cut-rate" druggists. Almost all merchants at times use the price appeal to attempt to secure business and try to sell as cheaply as they can; some merchants sell for cash, some on credit, some deliver and some do not; this is true of unit store owners and multiple store owners and these factors are not dependent on whether a man has two or more stores. Many chain concerns operating furniture, clothing, apparel and jewelry stores sell on credit; in fact a number of them constantly do business on the installment basis. Some grocery, drug and other chains give credit, others do not. Numbers of unit store merchants do a cash, no delivery business; others sell and deliver on credit. These facts are set up in the bill.

(h) As to "A greater turn over and constant analysis of the turn over to ascertain relative profits on varying items." It is alleged with respect to this that turn-over is a matter of volume of business done, and is related to the class of merchandise sold, not to the question of whether the ownership is of one or more stores. For instance in the jewelry, furniture, hardware and other businesses, the turnover is slow, while in such businesses as restaurants and confectionery, turn-over is rapid; that many unit merchants have as rapid turn-over as multiple store owners; that some individual merchants replenish their stocks frequently, and get a larger turn-over than chain store merchants; that analysis of turn-over is a matter of individual energy, temperament and interest in that particular phase of merchandising, and is not dependent or related to whether a man owns one or more than one store.

(i) As to "unified and therefore cheaper and better advertising for the entire chain in a given locality." Many chain store merchants do not advertise at all, while others do, and many unit merchants advertise intensively. It is obvious that advertising where a multiple store owner has only one store in a city or town is not of any advantage, and in large cities where many stores may be owned the prices and articles sold may vary according to location of stores, rents paid, degree of competition and other factors. The advertising applicable to a store in one section would not do for a store in a different kind of section. For further illustration in some cities, department store and unit toilet goods specialty shops use a great deal more lineage on toilet goods, cosmetics and related items, than chain drug companies. So far as advertising is concerned, wide distribution of stores is not an advantage, but a disadvantage. There is another disadvantage suffered by chain stores in advertising, if they attempt to advertise for several stores, as compared to advertising for a single store, namely that advertising for a unit store on a certain day will bring in large numbers of people into the one store, where a few salespeople can handle a large number of sales; whereas, to get the people into different stores means selling through various sets of salespeople, rent expenses, etc. As a matter of fact, any merchant usually spends a certain proportion of his sales, 1 to 3%, for advertising, and this is true as to unit stores or multiple stores. Competitive advertising of specials and other sales is widely done by single store merchants affiliated with concerns such as Better Food Stores and McKesson & Robbins, etc. See amended bill subsection (i) (R. 44 and 45 and exhibits).

(j) "As to standard forms of display for the promotion of sales." Nearly all stores are trying to get away from standard forms, and to use such display as the store owner or manager thinks will attract customers in his locality.

Many individual store owners use the same display methods as multiple owners, and standard forms are available to them if they desire to use them. Groups of unit store owners use such displays, while numbers of multiple store owners do not use standard forms. See subsection (j) (R. 45).

(k) As to "Superior management and method".

This is a characteristic of the individual merchant or concern, not of the ownership of one or several stores. Some chain stores are well managed, some poorly managed. Many unit stores have excellent management and methods, while others have not. Some outstanding chain merchants have been successful, and have established large businesses; some outstanding unit store merchants have had the best of management and built up large businesses. Some small chains are well managed, some small unit stores are well managed; some small chain stores and some unit stores are poorly managed; the same variation is true of large chain and large unit stores. Each store in a chain is in competition with many unit or other chain store merchants in a given neighborhood; some stores have good managers, some poor, and the question of personnel for store operation is one that is constantly confronting chains as well as individuals. Every merchant must face the same problems, and there is nothing inherent in the ownership of several stores that will solve these problems. Efficiency and inefficiency run through every cross section of life and business, and no method has yet been found to change this. Subsection (k) (R. 46), denies any advantage to the chain stores through superior management or method.

(l) As to "Concentration of Management in the special line of goods handled by the chains." This seems to assume a situation (namely, that chain stores are necessarily specialty shops) which is denied in the amended bill of complaint. Chain stores are not specialty shops, but handle various and varied lines of goods; there are department

store chains, handling thousands and thousands of items; general merchandise chains, selling diversified lines; men's clothing chains, selling clothes, haberdashery, shoes and other articles. The Penney Company, Montgomery Ward & Co., Sears Roebuck, W. T. Grant Co., J. J. Newberry Co., operate various departments and sell hundreds of items. The Liggett stores carry 11,000 or more different items, and compete with specialty shops, such as cigar stores, candy and confectionery stores, perfume shops, lunchrooms, stationery and book stores, some owned by merchants owning only one store, some owned by merchants with two or more stores. Certainly the individual merchant can and does concentrate on his particular line to the same extent as the multiple owner. These facts are set up in subdivision (1) (R. 47).

In connection with department stores, the court refers in the Indiana case to the fact that these are groups of different stores under one management. Does not this viewpoint overlook the fact that in the various departments, such as drug, grocery, furniture, books, clothing, shoes, etc., the large department stores will sell in each departments as much merchandise as all or great numbers of the units of the chain stores? For instance, R. H. Macy & Co., are said to do $5,000,000 a year in medicines, cosmetics and toilet goods. This is more business than is done by 90 of the Liggett stores in all their departments, prescription, medicines, hospital, soda, cigars, candy, stationery, etc. Yet under the Florida law Liggett would pay (disregarding the county line distinction) $2,390.00 for the privilege of carrying on its business, while Macy would pay $5.00. In many large, medium sized and some small cities and towns there are department stores with which the Liggett Company and other multiple merchants compete, which do as much or more business than is done by the chains in numbers of their stores. This is true in Florida, with respect to stores in a number of cities. Yet the multiple store owner

is discriminated against in the occupational tax for selling exactly the same things.

Such discrimination also applies as between multiple owners and other multiple owners. For illustration, the Katz Co. of Kansas City, is stated by Standard Statistics Co., to do more than $7,500,000 in eight drug stores; as much as the Liggett Company does in some 100 stores of its small volume stores; yet Katz would pay $75.00 and Liggett $4,790.00 occupation tax, with Katz having every advantage or difference that is referred to in the Indiana case. This is an illustration of the arbitrary manner in which the chain store tax works.

(m) As to "special accounting methods". Accounting methods differ by size of business, class of merchandise sold, whether on cash, credit or installment, etc. There are no special methods of accounting possessed by chain stores not available to the one-store owner. This is another matter of individual judgment and involves factors not connected with whether one or more stores are owned.

(n) As to "standardization of store management, sales policies and goods sold". Every store must, as is suggested in one of the earlier references in the Indiana opinion (keeping the stores stocked with merchandise suitable for the neighborhood customers who patronize them) be operated to suit the needs of its neighborhood. It is not possible to standardize so as to run a store at a busy transient corner of Jacksonville, Florida, in the same way as a store in the small place of Plant City, Florida; nor is it possible to sell exactly the same type of merchandise, cigars, candy, or even medicines, in Bangor, Maine, as in Miami, Florida, in New York City as in Seattle, Washington or Galveston, Texas. Merchandise suitable in Manchester, N. H., in November does not go in Coral Gables, Florida, during that month or later. Earmuffs would not be salable in Miami;

nor sun-burn remedies in Burlington, Vt., in December. Of course, the American people are educated to use a great number of highly advertised specialties, but even as to these, there are brands popular in one city that do not go in others. Store management and sales policies must be different in different places. In some price appeal is a major factor,—in others elements such as service, special sales, combination sales, etc., personal contact, count the most. Stores in the Bronx may vary from those in downtown New York. Stores in manufacturing cities such as Elizabeth, N. J., Fall River, Mass., or Pittsburgh, Pa., differ from the demands of stores reaching agricultural communities in the South or West or suburban or semi-rural communities elsewhere. Standardization may or may not be desirable, but so far as it is desirable, it is used by individual stores as much as chain stores. It would not be possible if the signs designating a particular owner were removed to tell whether a given store belongs to a merchant who has other stores or not. No advantage in respect to so-called standardization is enjoyed by chain stores not available and availed of by unit stores, as is shown by subsection (n) (R. 48).

(o) As to "differences or advantages" shown by "numbers of chains established or their growth".

During the expansion following the war, large capital became available for business expansion. According to the World Almanac, the population of the United States was in 1900, 75,974,575; in 1920, 105,710,620; in 1930, 122,775,046. The country's wealth was estimated at $88,517,307,000 in 1900, $320,863,862,000 in 1920, and $360,068,000,000 in 1928. Naturally to keep pace with these huge increases in population and in purchasing power, numerous stores of all kinds and character were established. Some merchants with one store enlarged their operations; other merchants with one store added another store. The unit stores kept growing at substantially the same rate as multiple stores.

Every time a merchant added a store, this would take one store out of the single unit class and put two into the multiple unit class. New people went into the mercantile business, and all types of business operation expanded. Great numbers of new single unit stores came into existence and merchants took on the ambition to trade with people in distant communities. All kinds of expansion took place in the mercantile as well as every other field. See subsection (o) (R. 49-50).

Since 1929, the reverse process has set in. Chain stores have fallen away with great rapidity, and large numbers have failed, gone out of business or reorganized with less units. Standard Statistics Company last summer listed over seventy-five chain store failures, including many large ones, such as National Family Stores, Metropolitan Five and Ten, F. & W. Grand-Silver Co., Schulte-United Company, Allison Drug Co., Neve Drug Co. Since then United Cigar Stores Company, United Retail Chemists Company, Owl Drug Company, Media Drug Company, Truly Warner, Inc., Newark Shoe Stores, and many others have gone into receivership or bankruptcy; and the rate of failure is large and continuing. Lack of capital, lack of many of the so-called advantages listed in the Indiana case, fall in real estate values, fall in commodity prices, and many other factors have been responsible for the fading away of these multiple unit outfits.

We respectfully submit that if this court's opinion in the Indiana case was not based on the right of the legislature to tax on an ascending scale because of mere number of stores owned (and the court, as we understood, definitely indicated that this was an error into which the lower Federal Court fell in its decision in the *Jackson* case), but was based on differences and advantages alleged to exist, and if these alleged differences do not now actually exist in Florida (as was admitted by the motion to dismiss), the Florida courts should have allowed appellants to go to

proof on the facts set up in Section XIV of the bill of complaint.

Appellant Liggett Company's stores are in competition with stores of both single unit and multiple unit stores in Florida; yet the appellants are taxed out of all proportion to its unit store competitors for the privilege of selling merchandise and serving and trading with its customers. If there are actually not essential distinctions between appellants and their unit store or other competitors, and if their competitors have all the advantages appellants are supposed to have, then surely there is no basis for the discrimination merely because one concern operates through several outlets, the other through one.

In the motion to dismiss the bill, the appellees admitted all the averments of the bill of complaint; yet the Florida court denied the appellants the right to go to trial on the facts set forth in the bill. Does not this deprive appellants of their day in court, and are they not entitled to be heard on their bill?

The matter resolved itself into a situation where, it would seem, the Supreme Court of Florida substituted its assumed judicial notice for the facts set up in complainant's bill.

This court will consider the actual state of facts presented by the factual situation brought to its attention in a particular case (*Weaver* v. *Palmer Bros.*, 270 U. S. 402; *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Quong Wing* v. *Kirkendall*, 223 U. S. 59).

In the light of the factual situation presented by the amended bill, we respectfully submit, the action of the Florida courts in dismissing the bill should be reversed.

POINT III.

Some economic and legal consequences of chain store tax legislation and decisions.

1. GENERAL.

In connection with the foregoing, we very respectfully ask permission of the court to discuss certain economic and legal phases of the chain store tax legislation and the *Jackson* decision, and the consequences that have grown therefrom.

We believe that it has always been the policy of the American system of government and of the Constitution of the United States to allow merchants to trade freely among the states, counties and cities, and with all the people, without artificial restrictions either through police regulations or arbitrary taxation. Indeed, in the original formation of our constitution, its framers were careful to preserve, free and unrestricted, the rights of the citizens of any state to trade with those of all other states. The common callings are open to every one; no monopolies, preferences or advantages may be given by legal restrictions in favor of one class of persons as against another. Furthermore, any person, from whatsoever walk of life springing, may enter into these common callings and may use whatever talents he has, and whatever opportunities he can avail himself of, to develop and spread, grow and expand.

A small merchant starting in in some small community, or a moderate sized place, or in some section of a large city, may build his business there to its limits, and spread to another section. Branch stores are nothing new in the history of this or any other country; and the natural and normal thing for a merchant to do who has one store in a locality and who thinks that he can successfully run another or other stores is to try to reach and trade with other people

in other locations by starting a branch in another place. Some merchants have been able thus to project their personalities and their business acumen over large numbers of stores. It has taken a great number of years and a tremendous amount of hard work to do this. Illustrations are J. C. Penney, with his starting store at Kemmerer, Wyoming, F. W. Woolworth, with his starting store at Watertown, N. Y., and Hartford with his starting store on Vesey Street, in New York. Other merchants have concentrated up their trade at a single location, by encouraging people to come into their stores through price, service and special merchandise appeals. Illustrations are R. H. Macy & Co., Marshall Field & Company, John Wanamaker; and in every city and moderate sized town there is an outstanding merchant who does a large volume of business in a single location. There are also numerous, less outstanding and indeed less successful merchants, who have endeavored to extend their trade in other parts of a city, into other cities and towns and trading locations by putting stores into such localities. Mercantile concerns with several or numbers of units have been given the name "chain stores"; but this is not a system of merchandise different from any other stores; nor is it a new thing springing up over night. Indeed, in the successful (and some of the unsuccessful) instances it has been of long and slow growth, though accelerated by the boom and expansion period which began about the time the United States entered the world war and terminated with the financial and commercial debacle of 1929 to the present. For instance, Hartford (A. & P. Co.), started in 1859; Woolworth shortly after the Civil War; Penney 30 years ago; and it is claimed that the first store of the present Liggett Company was started by Riker, or some predecessor druggist, back as far as 1826.

During the expansion period numbers of merchants, many of whom have fallen by the wayside, endeavored to

spread out into other communities and to trade with the people of these communities through stores there located. Stock promoters sold stock in projected chain concerns, pointing to the success of Woolworth and a few others as an inducement to investors to subscribe. Great numbers of stores were also during this period opened and established by merchants having but one store, and by merchants who branched out with two, three and a small number of stores.

Among the merchants who have multiple stores, the businesses are varied and diverse, and variously and diversely operated. Some are in the drug business, some in the grocery, some in the novelty, some in the department store line, selling almost everything,—some in general merchandise,—no special articles but anything their trade requires,—some deal in furniture, some in jewelry, and in every conceivable line; and the merchandise they sell is mixed and varied, the druggists carrying books, stationery, even toys, the grocers selling meats, cigarettes, etc., the variety chains selling almost everything. Some of these merchants sell on credit, some for cash, some on the installment plan; some are well managed, some poorly managed; some have warehouses, others do not; some advertise extensively, others not at all; some believe in buying in large quantities, some in hand-to-mouth buying; some pay their bills promptly and take discounts, some do not; some deal in quality merchandise, others in low or moderate priced articles; some cater to a quality trade, and sell at higher prices than others in the same line, because of rent and convenience of locations, service and other factors; some endeavor to give a high type of service, others have fewer salespeople and do not feature service; indeed some are self-service outfits; some are well capitalized; others are operating on meager capital; some standardize, others diversify; some are specialty shops, others sell hundreds, even thousands of different items; some use cheap fixtures and pay little attention to store appearance; some have

expensive fixtures and beautiful stores. These variations are exactly paralleled by the variations in unit stores. In a word, it may be said that the field of retail trade contains to some degree as many variations as there are merchants.

The only actual common denominator found among multiple store merchants is that they all own more than one store.

Some unit merchants do more volume of business in the same line than many chain stores in all their stores. Some carry more stocks than are found in all the stores of a so-called chain. Some do as much business in a single line as all or many stores of a competing multiple store merchant.

Every unit of a multiple store competes with many single stores, department stores, other multiple store units; and in the case of the department store chains, variety chains, drug stores, and practically all other stores, there is competition with departments of many other stores, single or multiple, specialty shops, etc. In the case of the *Liggett Company*, for illustration, in addition to competition with other drug stores, there is competition with department stores, perfume stores, general merchandise stores, with grocery stores in soaps, toilet preparations, cleaning fluids, insecticides, cigars and cigarettes, some proprietary medicines, and other articles; with confectionery stores, lunch rooms, restaurants, in candy and soda and lunches, with cigar stores, with book and stationery stores, and with many departments of various stores selling some of the same merchandise as the Liggett Company sells.

Each unit of a multiple store merchant must of necessity be operated separately, in respect to the needs, desires and habits of the individual city or community, or even parts of a community. Price competition is different in different localities, and even in the different sections of the same city. Small town stores require different handling from large city stores. The managerial ability and personality of the

local store manager plays a vital part in the success or failure of the store. In other words, each store must be conducted with regard to the local situation and local competitive conditions.

The manager and personnel of each store depend for their success on what they are able to do with their particular store, and whether they can satisfy the demands and wishes of their customers.

There is nothing magical or mysterious in the words "chain stores"; nor anything novel or different in what they try to do; they are simply groups of separate stores under one ownership. Their success or failure lies in how successfully they are managed and how well they are able to meet the needs of the communities in which they are located.

The building of good roads, the natural growth of population, have built up communities which form, of course, trading centers; and the merchants have undertaken to reach these communities with their stores.

Through cooperative buying associations any retailer, single store or otherwise, can get the benefit of quantity discounts. During recent years numbers of such associations have been formed, and some have extended their activities into sales promotion, advertising, fixturing and other fields.

Following the Indiana decision there have been a number of legislative enactments taxing chain stores. Among them is an ordinance in Hamtramck, Michigan, and a like ordinance in Maplewood, Missouri, placing a tax of $1,000.00 per store on each store over one; and the City of St. Louis, Missouri, has adopted an ordinance putting a graduated tax on multiple stores which runs up to $250 per store on each store over 25.

In the Indiana case, as we understand that decision, the court did not place the stamp of approval on the graduated taxation of stores because of the *mere ownership* of a number of stores; but based its decision on a differentiation in

the type of business, enumerating certain things as among the differentiating characteristics.

Yet in spite of the implications of this decision, the result has been to tax multiple store owners *solely on the basis of the number of stores possessed and without regard to whether they possessed any or all of the supposed differentiations.* Thus stores are taxed which do not purchase in quantity, which do not have warehouses, which do not advertise, which are poorly managed, which have inadequate capital, which do not standardize in any way, which do not specialize, which do not have expert buying, which have none of the characteristics referred to in the Indiana case, while single store owners having many or all these characteristics escape taxation.

2. LACK OF RELATIONSHIP BETWEEN TAX LIABILITY AND TEST OF CLASSIFICATION HAS LED TO ARBITRARY DISCRIMINATION.

The vice of this situation, it seems to us, is inherent in the type of the legislation, and ineradicable from it. Under these statutes the tax collector does not have to ascertain whether the multiple stores possess any characteristics differentiating them from the unit stores. It makes no difference whether merchandise is purchased in quantity, whether managerial skill is possessed, whether there is skill in buying, whether there is ample capital, etc.; the tax collector is not even interested in these things; *all that he has to do—all that the statute requires of him—is to count the number of stores and levy the tax.*

Thus Paxson, with seven little shoe stores in Florida pays $95.00 of tax, while Cohen's Department Store carrying more stock and doing more business in shoes than all the Paxson stores, pays $5.00 of tax.

It is difficult to understand why this is not purely arbitrary classification.

The tax is levied without any logical and substantial relationship between the taxing act and the method of classification. The only test of tax liability laid down by the statute is the number of stores owned. The result which has come about violates, we believe, a principle long held essential by this court in tax discrimination as well as police power cases.

If logical relationship were present, it would seem that there should be no difficulty in applying the tax to those who come within the class subject to the tax; but because of the lack of relationship between the ownership of more than one store and the factual characteristics necessary to sustain the classification, no tax-collecting authority is required to administer the tax on the actual basis held to support the classification. This court, in effect, as we understand, declined to sustain the classification because of the mere ownership of more than one store, but the tax-collecting authorities, on account of the nature and wording of the statutes, must and do apply the tax solely on the basis of number of stores owned.

To illustrate this point of lack of relationship, we refer again (at the risk of some repetition) to some of the so-called differentiating characteristics.

Quantity purchasing. Of itself, the phrase "quantity purchasing" means nothing, and it is apparently assumed that by such quantity purchases merchandise is handled at a lower cost. It seems also to be assumed that buying in quantity is a good thing, though in times of falling prices it will obviously lead to losses. One merchant may prefer to buy in small quantities and let the supplier carry the investment, while another merchant may consider it advisable to buy the larger quantity and get a discount, carrying the surplus stock until he sells it. Quantity purchasing is merely one item of cost of merchandising, and there are innumerable other elements going to make up the cost at which merchandise must be sold, such as rent, wages,

light, freight and cartage, etc. The expense of quantity purchasing and warehousing, if done, and the other expenses of overhead—of a central staff if there is one—may easily enable the merchant not buying in quantity to sell at the same prices as the merchant who does purchase in quantity. Many of the items sold in drug and other stores are subject to the best discounts when bought in moderate quantities. Many department stores and other large-scale unit merchants and many small merchants affiliated with buying associations get all the benefits of quantity purchasing. Regardless of these considerations, and regardless of whether the chain store merchant, be he a two-store or twenty-store owner, buys in quantity, the tax collector does not have to make any inquiry in this regard, since all the law requires is that the stores be counted, and taxed according to number; and the single store owner buying in quantity or getting the best quantity prices, pays but a fraction of the tax—because under the statute quantity purchasing is not a test of tax liability.

The same applies to buying for cash, and getting cash discounts. Regardless of whether the merchant does or does not buy for cash,—and there are plenty of single store merchants who do and plenty of single store merchants who do not—the multiple store owner pays the discriminating tax—the unit store owner does not,—because this element is not a test of tax liability under the statute.

This likewise applies to "skill in buying". The greatest skill in buying may be possessed by a unit merchant, yet he is not taxed, while the multiple store owner pays the tax.

So with warehousing of goods. Whether this is done or not the multiple store owners pay; the unit merchants (such as large department stores with huge warehouses) do not.

Abundant supply of capital may exist in the unit store, and not in the chain store; pricing and sales policy

may be identically the same in the unit as in the chain store; turnover and analysis may be the same, or the greater turnover may be with the unit stores; the chain store may do no advertising—the unit store a large amount; the chain store may not have standard forms of display; the management of the chain store may be not superior, but distinctly inferior; the badly managed, inefficient chain store pays, while the efficient unit merchant escapes; there may be no "special line of goods handled by the chain" in which it can concentrate; it may sell every diversified line sold by a department store, may in fact be a department store chain; yet the chain store would pay, the unit would not; there may be no "special accounting methods", and standardization of store management, sales policies and goods sold may be entirely absent; this does not exempt the chain store from the tax.

Any chain store concern may be lacking in some, any or all of these enumerated elements; it nevertheless pays for its stores many times the tax paid by the unit merchant who has all of them or some of them. If these elements must be interrelated and interdependent so as to bring about the differentiation and sustain the classification, it would seem that the chain store lacking any of the essential elements (such as superior management for instance) would not fall within the classification of stores which, under the apparent intent of the Indiana decision, should pay the discriminatory tax.

The point is, however, that the statute itself does not make the possession of any of these elements or some of them,—or all of them interrelated and interdependent,—a test or criterion of liabiilty for the tax. *The sole standard* is the number of stores. If the merchant has a number of stores, this is all the statute or the tax collector looks to. If the statute made the possession of abundance of capital a test all who had abundant capital would be subject to the tax, and those not possessing it would be exempt. So

with each of the other elements referred to. The legislators and aldermen who pass these laws do not, we believe, look at any element other than the possession of a number of stores. The form of the statutes and ordinances shows this.

In the Indiana case the court said that the court below fell into the error of assuming that the distinction between the chain store business and other stores was solely one of ownership. We respectfully suggest that this is an error made, requisite and inevitable in the framework of the statute; and is one into which every tax collecting authority and every tax-payer is bound to fall, due to the inherent nature of the tax in resting the discrimination solely on number of stores owned.

3. TAXATION AND CLASSIFICATION BY INTANGIBLE PERSONAL ATTRIBUTES.

Among the points of difference listed as supporting the classification are "skill in buying" and "superior management and method". This would seem to lead to the conclusion that if one merchant is efficient and another inefficient, the efficient merchant is, for classification for occupational tax purposes, in a different kind of business from the inefficient trader. Such a principle would, it seems, make it possible to tax every person in every occupation on a different rate, dependent on the taxing body's judgment as to the amount of skill or ability possessed by each individual. How the taxing authorities are to apply such a basis of classification is very hard to imagine. Our constitutional system allows all persons to engage in a vocation on equal terms. The tax levying authorities could hardly say that Jones is efficient and shall pay a large tax and Smith is inefficient and shall pay a small tax; or vice-versa that the inefficient merchant shall pay a large tax and the efficient one a small tax. Such things as managerial ability and skill in buying do not show differences between two

types of occupation but between the men operating them; and on this basis an inefficient chain store would be taxed on a different basis from an efficient one. To get at a true comparison as to whether there are differences in unit store and chain store merchants, it would seem that you would have to eliminate these intangible and unmeasurable personal characteristics and contrast a unit store that has capable and superior managerial ability with a chain store owner who also has buying efficiency and superior managerial ability; and an inefficient chain store owner with an inefficient unit store owner. Contrasting efficiency with inefficiency does not seem to distinguish, for occupational purposes, merchants or any other class of business man.

These personal managerial qualifications change from time to time, and sometimes in the same persons as the years go on; as experience is gathered or as habits may harden into stubborn inflexibility. For instance, the merchant who in the years prior to 1929 rushed out and hired a great number of stores and bought great quantities of merchandise and rented warehouses in which to store it, and did an expanding business based on pre-depression volume or continuously rising prices, may have been a great captain of industry prior to 1929; but with his business loaded up with too many stores or with rents disproportionate to any volume of business that can now be done, with warehouses that he cannot use or does not need, and with losses accumulating month after month as prices fell, what may have appeared to be superior management under conditions applying a few years ago may not have turned out to work so well under different conditions.

4. ALL COMPETITIVE STORES FAVORED OVER CHAIN STORES WITHOUT REGARD TO EXISTENCE OF DISTINCTIONS OR ADVANTAGES.

A good deal has been said about department stores and chain stores. The court in the Indiana case recognizes that

the department stores have such advantages as large capital, buying in quantity, managerial ability, etc., but distinguishes between chain stores and department stores on the ground that the unit stores with separate departments are not comparable to chain stores concentrating on a single line. This involves several elements to which we would like to direct the court's attention. First, it appears to be assumed that the chain stores are all specialty shops, which assumption seems to overlook the fact that great numbers of chain stores do not specialize in a single line since many of them are department stores, general merchandise stores, variety stores, etc., and others carry thousands of different kinds of articles for sale; secondly, the comment that the mass buying of a department store for a particular department is not comparable to the buying of a chain for its stores appears to overlook the fact that numerous department stores in direct competition with chain store units buy and sell more of a particular line of merchandise than many stores in chains dealing in that particular merchandise. In shoes, hats, clothing, shirts, books, furniture, etc., Macy's, Wanamaker, Gimbel, Bloomingdale, Marshall Field, The Fair, J. L. Hudson, Jordan-Marsh, for instance, and numerous other department stores in various cities and towns—and at least one or more in practically every large city—will do as much business as all the stores of a number of the small chains in these various lines; and as much business as many stores of the largest chains,—and the quantities purchased by the single unit department stores are sufficient to get the best quantity discounts and the business large enough to use the best employable buying and selling skill. There would seem to be no reason for taxing these unit stores at a $5.00 rate while 2 to 50 or even a hundred chain stores having no greater business, no larger stocks, and no advantages over their competitors, would pay $15.00 for two stores, $1475.00 for 50 stores and $4955.00 for 100 stores under laws like the Florida act (disregarding

the additional retroactive county line discrimination of that act).

It is well recognized, also, we believe, that large stores which can concentrate a great volume of business in one place, handling the customers through one set of salespeople who are kept constantly active, having one set of overhead for light, heat, etc., can make much more money and handle their merchandise more cheaply than if the same volume of business were done in a number of different stores, with numerous sets of salespeople, rent and overhead expenses.

It appears that chain store merchants are penalized whether their business is on a large scale or a small scale. Thus, a chain store owner doing a business of a million dollars in numerous stores pays many times the amount of tax paid by a department store doing a like volume in exactly the same line. A chain of 3 stores doing $75,000 of business pays five times as much in Florida as a single unit store doing $100,000 in the same line.

Also the statute makes no distinction as to class of merchandise sold or the department in which it may be sold. The tax is on the occupation of selling merchandise,—any kind of merchandise, without specification. Department stores are general merchandise stores. For keeping the biggest store, the department store pays $5.00; for small stores the chain pays per store many times as much tax. Also as is apparent, if each of the departments of the department stores were under a different roof, the tax would apply. Housed under one roof the tax does not apply. But for every roof of a chain store a cumulative tax is paid.

These are vices inherent in the type of law, and operating to give one merchant a competitive advantage over another in that the one escapes taxation, the other is heavily taxed.

By belonging to cooperative buying and merchandising associations, the unit stores obtain the benefits of

large scale merchandising; and the question would seem to be, not whether the stores belonging to cooperative associations are integrated as to ownership or in other respects in the same manner as chain stores, but whether they actually possess the various advantages that the other merchants are said to have. A number of chain store concerns are affiliated with cooperative associations, yet they pay the tax while single unit competitors do not. If single units affiliated with cooperative concerns operate on an equal basis with chain stores, it would not seem warranted that they should be favored by legislation allowing them to carry on exactly the same business—that of keeping store—on a less basis of taxation.

Some of the chain store owners (as do some of the department stores) merchandise on a large scale. The chain store companies doing very large-scale merchandising are few in number, but it may be that because these few successful and large concerns with many stores are prominent, merchandising through multiple store ownership—chain store merchandising—is thought of as large scale merchandising. That this is not generally true is shown by the number of two-store chains, three-store chains and local chains of 4 or more found in thirteen places in Florida previously referred to.

The Bureau of the Census states that in the United States there are 24,535 two-store merchants operating 49,070 stores, and 5,171 three-store merchants operating 15,513 stores; and in the State of Florida there are 400 two-store merchants with 800 stores; together with 77 three-store merchants with 231 stores. In the United States there are 3,177 chains with 4 to 6 units, having 13,638 stores, and 1,998 chains with 6 to 10 units. The chain store tax burdens reach these merchants regardless of size of business, stock carried, advantages or disadvantages with respect to competition, or any other consideration than number of stores owned. Obviously, many of these concerns cannot have much in the way of central staffs, warehouses, etc., unless as in the case of the

Katz Company store previously referred to, some of them do large volumes of business in their few stores, and this would be dependent entirely on the scale of the business conducted and not on the number of stores owned.

Now, large scale merchandising, if it carries with it advantages, also carries with it offsetting disadvantages. If through buying in large quantities and operating warehouses for storing the merchandise, quantity discounts can be obtained, the expenses of the warehousing and reshipping must be borne; if the chain is large enough for central executive and branch offices, "special accounting" forces and field men for contact with the stores, overhead expenses are created which the small local unit store does not have to meet. In times like the present, the small merchant has a flexibility that the large merchant, whether one of the big chains or a department store, does not enjoy. In the ordinary operation of his store in normal or abnormal times, the unit man, if alert and diligent, as thousands are, can adjust his expenses and handle his business so that his total cost of operation will enable him to sell on the same basis as the large scale operator,—if he is willing to do so. Willingness to do so is a factor for the reason that if a merchant is satisfied, with a small return on his capital, he may sell at less than one who demands a larger share. Willingness of large concerns to take a small return on invested capital may make a sharp difference in the price for which their articles are sold, as contrasted with a small merchant who insists on a higher return; and the reverse is of course true where the large concern wants large dividends and the small one is satisfied with moderate returns on his capital. If a merchant watches his credit costs and losses and delivery costs carefully, he can sell as cheaply as any one—if willing to do so. If he does not sell on credit and does not make deliveries, he may have to content himself with a smaller volume of business, but of course some losses and expenses are eliminated. This is true of chains, unit stores, department stores, and all merchants,

who vary credit and delivery practice as their trade demands or their judgment dictates. In the drug business there are instances of one-store merchants on side streets who sell for cash and by low-price appeal do $400,000 to $500,000 of business, taking 2% return, making a substantial amount of money, and meeting prices of all competitors.

Innumerable alert, intelligent unit operators are at no disadvantage with their competition of whatsoever sort. With no substantial overhead and no large expenses, these merchants do not need that which they are not entitled to, but which they have in some states and cities, the favoring factor of a discriminating tax against some of their competitors.

This discriminating tax is becoming more and more severe, as to the state tax, there are added county taxes and municipal taxes. Thus a chain store may be subjected to three sets of taxes;—and certainly there cannot be three different sets of advantages.

There is of course a non-essential distinction between the merchant operating through a number and the merchant doing business in one store, in that the office of the multiple owner is in a different place from one or more of the stores; and also in that the second and subsequent stores must be operated through agents. Such distinctions have been held by this court not sufficient to justify separate classifications for occupational purposes.

The further effect of the chain store taxing statutes, is to encourage large stores and the concentration of business in large centers; and to discourage the spread of stores to small communities and little trading centers.

5. MERCHANTS WHO OPEN A SECOND OR ADDITIONAL STORES DO NOT THEREBY PLACE THEMSELVES IN A NEW TRADE OR CALLING.

The *Metropolis Theatre* case, 228 U. S. 61, is referred to as a precedent for the chain store tax statute. The classifi-

cation on the basis of amount charged per ticket seems clearly distinguishable. This is a tangible, measurable thing, furnishing a direct method of differentiation. There is no such element expressed in the chain store statutes and none at all aside from the number of stores operated. The other point in the *Metropolis* case is that the second type of theatre is said to have placed itself in a different class by deliberately choosing to operate the higher priced theatre, and that this affords basis for the legislative action. The one store merchant who becomes a two-store merchant makes no choice of deliberately embarking in a different type of business, nor any choice of charging higher or lower prices, or changing the nature of his business. All he does is to try to extend the identical business he has always been in, pursuing the same activities exactly. The theatre man who chose to operate a 50c. maximum price might be going into a different priced business if he opened a $1.00 maximum house; he would not be going into a different business if he opened a second 50c. theatre. If one 50c. theatre man had a house with a seating capacity of 3,000, and did a business of $450,000.00 per annum, and another 50c. theatre man had a house with a seating capacity of 300 and opened seven more theatres each with a seating capacity of 300, a total capacity of 2400 and did a total volume of $360,000.00 and a taxing statute taxed all theatres at $5.00, the one theatre man would pay $5.00 and the eight theatres would pay $40.00. But if the one theatre man had to pay $5.00, and the 8-theatre man had to pay $5.00 for the first theatre and $15.00 each for the next three and $20.00 each for the next three and $25.00 for the eighth, $135.00 or 27 times as much as the one-theatre man, on the assumption that the possession of eight theatres gave him great advantages over a one-theatre man, he would certainly seem to be discriminated against, in being charged $17.00 per theatre while his competitors—large, small and medium

sized—in each neighborhood would be paying only $5.00 each in tax—$135.00 for the privilege to one man of owning eight theatres (plus possible added taxes for the county and municipality), $40.00 for the privilege to eight people to own eight theatres.

And it would not console the eight-theatre man a great deal—as he looked about and saw several one-theatre concerns that were larger and a number that were equal in size to several of his theatres—to know that he had to pay the extra amount of taxes because he was supposed to have superior managerial ability from the fact that he had eight little theatres instead of one or a few big ones.

The druggist or clothier, shoe man, or general merchandiser does not go into a different business or change his calling when he opens his second or tenth or twentieth store; nor into a still different business every time the number of his stores reaches the higher tax brackets of the chain store statutes. He is in still the same business, with all its old attributes and all its old problems. He is simply trying for more trade, as he constantly does in his one or each of his several stores.

Conclusion.

Because the actual result of the chain store statutes has been to tax solely by number of stores, and because the taxing requirements of such statutes is not connected up with the basis of classification deemed to support the discrimination, the Indiana decision seems to become a precedent for levying occupational taxes on an arbitrary basis—for the tax may be collected whether the supposed grounds of classification exist or not. If amount of capital employed is a distinguishing characteristic, all who have like amounts should be taxed equally; but stores or automobiles, or boats, or houses, or acres of land, can if the type of the chain store laws be followed, be classified and taxed on

an ascending scale, without regard to the capital employed in the business, or the size, capacity or type of the thing taxed, or any other tangible feature; and the Indiana decision seems also to stand as a precedent for classification based on skill, efficiency, superiority and other personal attributes.

Because of the fact that the tax collector need go no further than count the number of stores and apply the tax, the result is to create all kinds of confusion and discriminations in taxation of stores, single unit or multiple, regardless of stock carried, space occupied, business done, income earned, or any other basis.

This court has not hesitated to overrule previous decisions for considerations appealing to it as controlling; if the considerations suggested above lead the court to the conclusion that such statutes as the Indiana and North Carolina chain store tax laws or the Florida law, their offspring —using as a sole measure of classification the number of stores owned—should not be sustained, the Florida statute might be declared unconstitutional on its face, and the previous cases overruled.

Regardless, however, of these general considerations, we respectfully submit, that the Florida statute, is arbitrary and void on its face because of the county line discrimination; and in any event, we further respectfully submit, the factual situation presented by the amended bill of complaint is such as to require reversal of the decision of the Supreme Court of Florida, and the sending of the case back to the Florida court for trial, thus allowing appellants their day in court.

Respectfully submitted,

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